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Supreme Court, U.S.
FILED

No. _____ 98 260 AUG 7 1998

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In The

# Supreme Court of the United States

October Term, 1997

ELLEN BYRD and VIVIEN HARKNESS,

*Petitioners,*

v.

VIC CANTU, MARK VAN HOLT, and CITY OF LOS ALAMITOS,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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68 pp

## QUESTIONS PRESENTED

1. In an action under 42 U.S.C. § 1983 (1982) based on a use of allegedly excessive, deadly force, what is the appropriate standard by which to judge police conduct, when the plaintiffs who assert such a claim derive their *standing* to sue from the Fourteenth Amendment? Is it the Fourth Amendment "reasonableness" standard, or is it the Fourteenth Amendment standard?

2. Under Rule 8(a)(2), (e), and (f), F.R. Civ. P., does a party making a claim under 42 U.S.C. § 1983 (1982) forfeit her claim when she fails to allege the legal conclusion she is a "successor in interest" to her decedent, when she has pled facts to support that legal conclusion.

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## PETITION FOR WRIT OF CERTIORARI

Ellen Byrd and Vivien Harkness petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINION BELOW

The opinion of the Court of Appeals is reported at 137 F.3d 1126 (9th Cir. 1998). Appendix A.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1998, a timely petition for rehearing with a suggestion for rehearing *en banc* was submitted, and the petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected on May 11, 1998, Appendix B, and this Petition timely will have been filed within 90 days of the disposition of the rehearing petition, by August 10, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## STATEMENT

On January 23, 1993, respondent Los Alamitos police officers Vic Cantu and Mark Van Holt came to the Los Alamitos, California apartment residence of Sylvan Byrd and his spouse, petitioner Ellen Byrd. Petitioner Vivien Harkness is the only parent of Sylvan Byrd.

Petitioners contended that the officers used excessive, deadly force that wrongfully resulted in Sylvan Byrd's death from gunshot wounds inflicted by the officers.

Respondents arrived at the Byrd's apartment in late afternoon to investigate information that persons in the apartment were arguing loudly, and were investigating a domestic disturbance matter.

Ellen Byrd and Sylvan Byrd heard a pounding on the front door of their apartment. Outside their door stood respondents, who did not believe an emergency existed. Neither respondent announced himself as a police officer, but respondent Cantu banged on the door four or five times. Respondent Cantu then covered the peephole of the door with one hand, because he "didn't want the guy to be able to look out and see it was a police officer there," thus making it impossible for Sylvan Byrd to see who was banging on his door.

Ellen Byrd and Sylvan Byrd looked at one another, Sylvan Byrd looked at the door, and the then went back into the hall and returned with his gun.

Ellen Byrd, who was within "her arm's reach of . . . [her] husband's backside and rear end," and who was facing towards the door, observed her spouse approach the door, and "come down from the position of looking up at the peephole [which was covered on its other side by respondent Cantu] and open the door." Ellen Byrd observed Sylvan Byrd open the door, which was hinged to his left, with his left hand, while holding his gun in his right hand behind his right thigh and down. He opened the door about eight to ten inches and

"put his head in a position as if he was curving over . . . to his left and reaching over to look outside the door." Then, Ellen Byrd observed that "the door came out and there were shots [fired by respondents] and he [Sylvan Byrd] went to the ground." Before respondents fired their shots, Sylvan Byrd never moved his gun from its position behind his right thigh, and his right hand never came up. Ellen Byrd was focused on her spouse's gun the entire time her spouse was at the door, and only stopped looking at it when she saw him falling to the ground.

Respondents said nothing at all before they began shooting, and only four seconds passed from the time decedent opened the door to the time shots rang out.

Respondent Cantu testified that within five to 10 seconds of banging on the door, the door opened about 18 inches, Cantu and Sylvan Byrd looked each other in the eyes, Cantu said "hello," and then Cantu asked Byrd what he had in his right hand that was out of Cantu's sight and behind Byrd's back, and followed that with the command "Let me see your hand!" three or four times. Byrd complied, Cantu testified, showed Cantu the gun, Cantu then believed Byrd would shoot respondents, and both respondents shot and killed Byrd. By doing this, Cantu did something wholly unreasonable, to wit, he ordered someone whom he believed might be armed with a gun to point the gun at respondents.

Cantu testified that the door began to close and Byrd brought the gun up and pointed it at respondent Van Holt, upon which Cantu kicked, pushed, or punched the door, causing it to open. Cantu stepped back, drew his

gun, and both respondents shot through the door, hitting and killing Byrd.

Petitioners sued under 42 U.S.C. § 1983 (1982), and identified themselves in their complaint as, respectively, the spouse and the mother of the deceased, Sylvan Byrd. Second Amended Complaint, at averment 10, lines 12-13. Appendix C. However, they did not set forth in that complaint the legal conclusion that follows from those designations, that is, that they are, under California state law, the legal successors in interest to Sylvan Byrd, who therefore have legal capacity to sue as such on Sylvan Byrd's Section 1983 survival-type, Fourth Amendment, excessive force claim.

Respondents acknowledged that petitioners sued in two, separate capacities, as the representatives of the deceased, and in their own rights. In the answer, in their twenty-seventh affirmative defense, respondents pled that "these answering Defendants allege that Plaintiffs have no standing to bring this action as the heirs of decedent." Answer to Second Amended Complaint, at averment 41, page nine, lines 16-19. Appendix D. Respondents knew petitioners brought the suit in their representative capacities, and set up a defense to such standing. In the answer at averment 44, page 10, lines 8-11, the thirtieth affirmative defense states that "Defendants allege that neither Plaintiffs nor Plaintiffs' decedent are a member of any constitutionally protected class[,]" thus evidencing that respondents, themselves perceived petitioners and petitioners' decedent (with petitioners as his representative) to be two, distinct classes of plaintiffs.

The pre-trial conference order acknowledges at page three, lines four through five that "The pleadings which raise the issues are: (list) The Second Amended Complaint and the Answer thereto." Appendix E.

The action was tried to a jury beginning on September 29, 1995, and after the close of evidence, but immediately before summations were to have begun, the trial judge *sua sponte* raised the issue of the correct standard of culpability to be applied to Section 1983 claims made by parties, who in their own right (as opposed to parties who sue as successors in interest on survival-type claims), sue under Section 1983 for their own losses based on the death of another person. The trial judge previously ruled that, because petitioners had not set forth in their complaint the legally conclusory words "successors in interest" that followed from petitioners' relationships as, respectively, spouse and mother of the decedent, petitioners forfeited the right to proceed on their successor in interest claims, with respect to which there was no disagreement that the appropriate standard of culpability was the Fourth Amendment "reasonableness" standard.

The trial judge declared a mistrial immediately before summations were to have begun, invited respondents to make a motion for summary judgment, and then granted that motion, dismissing, as a matter of law, petitioners' then-remaining personal claims as relatives of the decedent. Appendix F. An appeal followed.

The court below decided as follows: (1) petitioners were without standing to sue as successors in interest of

the decedent because they did not set forth in the complaint, *in haec verba*, that they were "successors in interest;" (2) petitioners could not proceed on their personal claims because they always contended that the standard of culpability on that claim was the Fourth Amendment, "reasonableness" standard, and that since it turned out (on appeal) that the correct standard was, in fact, the Fourteenth Amendment standard of "deliberate indifference," that defendants would be unfairly disadvantaged if the case were to proceed to trial on that standard (which, in fact, imposes a *higher* burden of proof on plaintiffs than does the "reasonableness" standard).

The evidence was precisely the same on *both* claims, and petitioners have found no case that would support the Ninth Circuit's novel theory that the assertion of a culpability standard that *post facto* is determined to be incorrect operates to wipe out a claim on which admittedly sufficient evidence was adduced at trial by the claimant. The Circuit's holding on this point is without any legal basis at all.

Petitioners requested rehearing and made a suggestion for rehearing *en banc*, but the request was denied and the suggestion was rejected. Appendix B.

## REASONS FOR GRANTING THE PETITION

1. The court below decided issues in manners contrary to controlling Supreme Court precedent, *see Graham v. Connor*, 490 U.S. 386 (1989) (claims of unreasonable force used during seizures to be judged under the Fourth Amendment); *County of Sacramento v. Lewis*, 521 U.S. ___,

118 S.Ct. 1708 (1998) (same), and contrary to the clear wording and intention of a rule of federal civil procedure, Rule 8(a)(2), (e), and (f), and in ways that do not make sense.

2. There is a conflict among the circuit courts of appeals, as well as an intra-circuit conflict in the Ninth Circuit.

3. The court below has created a confusing anomaly in which Section 1983 claims based on an underlying incident of alleged use of unreasonable force, when brought by survivors who also are relatives of a decedent, will be judged based on two different legal standards.

4. Public officers have used methods that are alien to our Constitution, and they will be permitted to escape the consequences of their bad conduct unless certiorari is granted.

5. The issues presented will affect numerous federal civil rights cases.

## SUMMARY OF ARGUMENT

Petitioners sued police whom they claimed unreasonably used deadly force to kill their decedent, respectively, their husband and son. Petitioners were the only successors in interest to their decedent, and pled the facts that entitled them to standing as successors in interest to their decedent's excessive force claim that survived his death.

Petitioners contended throughout their action that, because the underlying government *behavior* on which

they based their suit was an alleged use of unreasonable force, and notwithstanding that their *standing* to sue in their own rights for their own losses was based on the Fourteenth Amendment, nevertheless, the one, uniform standard of culpability for all of their claims, as successors in interest and in their own right, was the Fourth Amendment "reasonableness" standard.

None of the facts (1) that petitioners did not recite the mantra "successors in interest" in their complaint, when the facts pled demonstrated petitioners were, in fact, successors in interest, (2) that the district court did not know the standard of culpability to be applied to petitioners' claims in their own rights, and on that basis refused to let the case proceed to the jury, or (3) that the court of appeals, after the fact, set forth the standard of culpability on petitioners' personal claims to be the Fourteenth Amendment standard, should have caused a forfeiture of any of petitioners' Section 1983 claims. Indeed, the district court's lack of knowledge of what the correct standard was should be sufficient in itself to have warranted reversal of the district court by the court below.

## ARGUMENT

### 1. THE CORRECT STANDARD OF CULPABILITY FOR THE CLAIMS OF *ALL* SECTION 1983 PLAINTIFFS WHO BRING CLAIMS BASED ON *BEHAVIOR* THAT IS ALLEGED TO CONSTITUTE A USE OF EXCESSIVE FORCE IS THE FOURTH AMENDMENT "REASONABLENESS" STANDARD.

#### A. INTRODUCTION

Contrary to this Court's controlling precedent in both *Graham* and *Lewis*, the court below held, in a case founded on an allegation of *behavior* constituting unreasonable force, that the standard of culpability is standing-based, and not defendant-*behavior*-based, and therefore is derived from the Fourteenth Amendment. In effect, the court below decided that the constitutional amendment on which standing is based is determinative of the standard of culpability. This is a category mistake, because it places standing to sue and standard of culpability in the same category, when in law these two, different concepts are two separate and distinct, different categories.

The disposition below, it is permitted to stand, will create two different standards for judging the culpability of a defendant's conduct in all Section 1983 death cases in which survival-type claims and claims by the decedent's survivors on their own behalf are asserted. Thus, in a Section 1983 death case, the anomalous situation could arise whereby a defendant's conduct would be judged under the Fourth Amendment "reasonableness" standard with respect to the successor in interest plaintiffs, who stand in the shoes of the decedent, while the same conduct would be judged under the Fourteenth Amendment

"deliberate indifference" standard with respect to a survivor's claims arising under the Fourteenth Amendment Due Process Clause. This is contrary to both the letter and spirit of this Court's holding in *Graham*, and also it is contrary to an abundance of recent Supreme Court authority which consistently has moved the basis for Section 1983 actions away from the Fourteenth Amendment and into the realm of the Fourth Amendment. *See, e.g., Lewis, supra; Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (reluctance to expand substantive due process because there are no "guideposts for responsible decisionmaking in this unchartered [*sic*] area [and they] are scarce and openended."); *Albright v. Oliver*, 510 U.S. 266, 271-72 (1994) (plurality) (same). Two different standards of culpability will confuse juries, who would be forced to evaluate the same underlying conduct under two, different standards of culpability. On its face, this makes no sense at all, and invites confusion.

This issue is one of exceptional importance in that it will affect nationally a significant number of Section 1983 actions, and in that it overlooks and misapprehends controlling law, and is a parallax view of the law that puts inappropriate form over appropriate substance to deprive petitioners of significant rights they had.

### B. THE APPROPRIATE STANDARD OF CULPABILITY IN *ALL* SECTION 1983 ACTIONS IN WHICH THE UNDERLYING *BEHAVIOR* IS A USE OF ALLEGEDLY EXCESSIVE FORCE IS NOT THE FOURTEENTH AMENDMENT "DELIBERATE INDIFFERENCE" STANDARD, BUT IS THE FOURTH AMENDMENT "REASONABLENESS" STANDARD.

Indeed, until the disposition of this case by the court below, it seemed that there was no question but that the

standard of culpability in *all* Section 1983 claims based on *behavior* alleged to be a use of excessive force was the Fourth Amendment "reasonableness" standard.

In *Graham*, this Court held:

> Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment[:] . . . [t]his much is clear from our decision in *Tennessee v. Garner*. . . . [A]ll claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest or investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.
>
> . . . .
>
> Today we make explicit what was implicit in Garner's analysis, and hold that all claims that law enforcement officers have used excessive force – deadly or not – in the course of the arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process approach."

490 U.S. at 394-95. Here, the claim is that excessive force was used in the course of an investigatory stop and seizure. Therefore, the proper analysis is under the Fourth, and not the Fourteenth, Amendment. The Fourth Amendment's "reasonableness" standard, and not the Fourteenth Amendment's "deliberate indifference" standard, therefore, is applicable.

Five years after this Court decided *Graham*, it reaffirmed that "[w]here a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government *behavior*, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright, supra*, 510 U.S. at 273 (quoting *Graham*, 490 U.S. at 395) (internal quotation marks omitted; emphasis added). This passage clarifies that it is *government behavior*, rather than the source for standing of a particular party, that must serve as the basis for analysis of excessive force claims. Thus, since the government *behavior* of which complaint was made in this case is Fourth Amendment government *behavior*, the Fourth Amendment provides the basis for analysis.

In *Lewis*, this Court reiterated that "[j]ust last Term, we explained that *Graham* . . . 'simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth . . . Amendment, the claim *must* be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.' *United States v. Lanier*, 520 U.S. 259, ___ n. 7, 117 S.Ct. 1219, 1228 . . . (1997)." *Lewis*, 521 U.S. ___, 118 S.Ct. at 1715. (emphasis added). This Court further held

that "[s]ubstantive due process analysis is therefore inappropriate in this case only if respondents' claim is 'covered by' the Fourth Amendment. It is not." *Ibid.* By the same, correct logic, *modus ponens*, in the instant case, since petitioners' claim *is covered by* the Fourth Amendment, "substantive due process analysis is therefore inappropriate." Therefore, the court below erred by holding that substantive due process provided the source for analysis of petitioners' personal claims. *See also, Pleasant v. Zamieski*, 895 F.2d 272, 276 n. 2 (6th Cir.) (noting that *Graham* "preserve[s] fourteenth amendment substantive due process analysis for those instances in which a free citizen is denied his or her constitutional right to life through means other than a law enforcement official's arrest, investigatory stop or other seizure"), *cert. denied*, 498 U.S. 851 (1990) (cited with approval and quoted in *Lewis*, 521 U.S. at ___, 118 S.Ct. at 1716).

Unlike *Lewis*, in which this Court noted that "[t]he Fourth Amendment covers only 'searches and seizures,' U.S. Const., Amdt. 4, neither of which took place here[,] [and that n]o one suggests that there was a search, and our cases foreclose finding a seizure[,]" 521 U.S. at ___, 118 S.Ct. at 1715, in the instant case, no one suggests that there was *not* a seizure: that is, no one suggests that an intentional application of force by the police in the circumstances of this case ever could *not* be a seizure, because, "when there is a governmental termination of freedom of movement through means intentionally applied[,]" *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (cited with approval and quoted in *Lewis*, 521 U.S. at ___, 118 S.Ct. at 1716), that constitutes a seizure. Here, respondents most certainly terminated Sylvan Byrd's

freedom of movement through means intentionally applied, and therefore, force was used against him in the course of an investigatory stop and that force constituted a Fourth Amendment seizure.

Thus, the court below significantly erred by holding that the petitioners' personal claims should be analyzed under the Fourteenth Amendment "deliberate indifference" standard. Indeed, "deliberate indifference" necessarily and linguistically requires an object, and here respondents could not have been "deliberately indifferent" to petitioners, of whose existence or statuses respondents were ignorant at the moment they fired the fatal shots. To use language, even in law, to attempt to communicate that a person was deliberately indifferent to that about which she did not know does not make sense.

In *Curnow v. Ridgecrest Police*, 952 F.2d 321, 324 (9th Cir. 1991), the court below readily recognized that "[t]here is no question that the apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed. 2d 1 (1985)." *See also, Graham, supra.*

Also, in *Curnow*, the court below considered the "claim . . . made by [a decedent's] parents and children." *Id.* at 325. The court below noted that "[t]here is no mistaking[1] the holding of *Graham v. Connor*[ ] [that] . . . all law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory

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[1] This epistemological prophecy was wrong, as the disposition of which certiorari is sought demonstrates.

stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Ibid.*

The court below then, itself created the confusion that is the genesis of its category mistake in this case, when it cited and relied upon three pre-*Graham* cases to reach the inappropriate conclusion that "a parent who claims loss of the companionship and society of his or her child, or vice versa, raises *a different constitutional claim* [than one under the Fourth Amendment]," in order to reach a conclusion as to standing: that "*Graham v. Connor* does not bar the parents' and children's due process claims." *Ibid.* (emphasis added). And, this is the mistake: that a claim is not "barred" is not a basis for determining what standard of culpability is to be applied to such a claim. What the court below seemingly and apparently unwittingly did in *Curnow*, and which sowed the bad seed for the disposition in this case, was to confuse the category of constitutional standard with the category of standing, thus engaging in a category mistake, in order to reach the result that the *Graham* precedent on constitutional standard did not operate to wipe out Fourteenth Amendment standing to bring a claim on which the constitutional standard of culpability would derive from the Fourth Amendment. The court below erroneously engrafted onto a claim with respect to which *standing* derived from the Fourteenth Amendment, a Fourteenth Amendment standard of culpability in order to preserve standing for parents and others to bring Section 1983 claims based on a use of excessive force against a dead relative.

In simple, the constitutional amendment on which *standing* to bring a Section 1983 claim is based does not dictate that the same constitutional amendment is the correct source for the constitutional standard of culpability. This Court needs to fix this error.

Standing to bring a Section 1983 claim is based on the status or capacity of the person who brings the claim – it is plaintiff-based – but the nature of the underlying wrongful *behavior* in issue dictates the constitutional amendment from which the standard of culpability must come, because standards of culpability are defendant-based.[2] Here, it is the Fourth Amendment, because the underlying wrong was a use of force. *Graham, supra.*

As the court below admitted, "if they [both the representative claim and the individual claim] are governed by the same standard, the Byrd's evidence at trial established both claims, and both should have been submitted to the jury." 137 F.3d at 1133. Notwithstanding this admission, the court below then pulled from the sky of supposed precedent and turned to this Court's statement in *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978), *a standing case*, for the pre-*Graham* statement that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted[ ]" to buttress its finding that "the Byrds would be vicariously asserting Sylvan's Fourth Amendment rights, in violation of *Rakas's* admonition." 137 F.3d at 1134. This

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[2] In the context of damages, for example, compensatory damages are plaintiff-based, while punitive damages are defendant-based.

pronouncement on standing incorrectly was used to decide the source for the culpability standard.

What is wrong with this line of reasoning is that it is pre-*Graham*, and *Graham* modified it to the extent that every Section 1983 claim based on an alleged use of excessive force is to be evaluated based on the Fourth Amendment standard of "reasonableness," no matter who brings it, and this is so notwithstanding that *state* law confers standing to bring such a claim. *Rakas* simply is not applicable in these circumstances in light of *Graham*. The legal fact is that Section 1983 survival claims brought based on standing conferred by state law, are nonetheless governed by the Fourth Amendment's "reasonableness" standard, when the underlying wrongful *behavior* is an alleged use of excessive force. So, too, a decedent's heir's individual Section 1983 claims for loss of the decedent whose death has been brought about by the use of deadly force, similarly should be governed by the Fourth Amendment's "reasonableness" standard, notwithstanding that standing to bring suit is conferred by the Fourteenth Amendment due process clause.

Because petitioners' claims as individuals properly *are governed* by the standard of "reasonableness" they must be reinstated.

### C. IT WAS ERRONEOUS TO HOLD THAT IF ONE ASSERTS A STANDARD OF CULPABILITY THAT TURNS OUT TO BE INCORRECT, ONE FORFEITS HER CLAIM.

Petitioners pled *both* a Fourth Amendment claim and a Fourteenth Amendment claim. *See* second amended

complaint at averment 11, lines 8-12. Appenedix C. In fact, the evidence to support *both* claims was identical, as the court below correctly recognized, 137 F.3d at 1134, *supra* at 16: the evidence of the manner in which petitioners' decedent was killed by respondents. Yet, the court below held that "the Byrds had not pursued the Fourteenth Amendment claim at trial,"[3] *ibid.*, and "at trial, the Byrds proceeded entirely under the Fourth Amendment's objective reasonableness test. The district court correctly reasoned that it would be unfair to submit the Fourteenth Amendment claim to the jury when there had been no evidence on it during the trial." *Id.* at 1134. Indeed, there simply was no other evidence, other than the evidence of the shooting. This finding is bizarre. The evidence is *factual*, and would not consist of legal conclusions. The only evidence petitioners needed to put on, or could put on, was evidence of the facts of what happened. This they did.

That respondents argued for the Fourteenth Amendment standard of culpability and petitioners argued for the Fourth Amendment standard has nothing to do with evidence that would support the petitioners' claims.

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[3] What this means is beyond comprehension, because petitioners put on abundant evidence to support legal claims that defendants' conduct was "unreasonable" and/or was "deliberately indifferent." And, the "deliberate indifference" could not, logically or semantically, have as its object petitioners, because respondents did not know either petitioner (a spouse or a parent) existed at the moment they used deadly force. What is unknown cannot be an object of anything, and to hold that petitioners who were not known to exist may be or can be the objects of "deliberate indifference" is absurd.

That petitioners' *standing* in their individual capacities is founded on the Fourteenth Amendment does not mean that the standard of culpability derives from the same source as their standing, *see supra*, because in *Graham* this Court ruled that "*all* claims that law enforcement officers used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its reasonableness standard rather than under a 'substantive due process approach.' " 490 U.S. at 395 (emphasis added). The failure of the court below even to mention *Graham* is incomprehensible.

Because petitioners put on evidence that would have supported a jury finding of "deliberate indifference," the court below erred in finding that petitioners forfeited their personal claims because they pursued a legal theory that their personal claims were to be analyzed under the Fourth Amendment.

### D. THERE IS A CONFLICT BETWEEN THE CIRCUITS ON THIS ISSUE. ALSO, THERE IS AN INTRA-CIRCUIT CONFLICT IN THE NINTH CIRCUIT.

The Ninth Circuit held in this case that the appropriate standard of culpability for individual's Section 1983 claims brought based on a close relative's death caused by an intentional use of force by police is the Fourteenth Amendment "deliberate indifference" standard.

In *Salim v. Proulx*, 93 F.3d 86, 88 (2d Cir. 1996), the Second Circuit held that the Fourth Amendment provides the applicable standard.

In *Salim*, police used deadly force during the course of an arrest, which resulted in plaintiff's son's death. The court held:

> The gravamen of plaintiff's complaint with respect to Officer Proulx is that the officer unconstitutionally used excessive force by fatally shooting Eric [her son] or by creating a situation in which the use of deadly force was likely to occur. Although plaintiff makes this claim pursuant to a number of federal statutes and constitutional amendments, the claim that a police officer used excessive force, including deadly force, is properly styled a section 1983 action and analyzed under the Fourth Amendment's reasonableness standard. *See Graham v. Connor*, 490 U.S. 386, 395 . . . (1989).

*Ibid.*

There also is a conflict on this issue in the Ninth Circuit, which it is unwilling to resolve for itself.

The Ninth Circuit recognizes that "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government *behavior*, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing [a plaintiff's] Section 1983 claims.' *Albright v. Oliver*, 510 U.S. 266, 273 . . . (1994) (Rehnquist, C.J., for plurality) (quoting *Graham v. Connor*, 490 U.S. 386, 395 [1989])." *Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996) (emphasis added). It is the police *behavior* that dictates the constitutional amendment from which the culpability standard is to be derived, and not the source of a plaintiff's standing to sue.

In *Armendariz v. Penman*, 75 F.3d 1311, 1321-22 (9th Cir. 1996), the Ninth Circuit held that "[i]t is clear from *Graham* and *Albright* that when the Fourth Amendment provides limitations on the type of government *conduct* challenged by a plaintiff's claim, that Amendment, rather than the constitution's substantive due process protections, must govern the plaintiff's claim. . . . *Graham* and *Albright* make clear that any 'explicit textual source of constitutional protection,' *Graham*, 490 U.S. at 395, . . . preempts a more generalized substantive due process claim." (Emphasis added.) Again, the Ninth Circuit recognized that the standard of culpability is defendant-based, rather than plaintiff-based.

Indeed, when the Ninth Circuit erroneously believed it had a choice between selecting a standard of culpability with respect to a claim based on an underlying incident of improper confinement or false imprisonment, it held that "[w]e can examine such claims . . . using either a due process . . . or a Fourth Amemdent analysis. [Citation omitted.] . . . [W]e will use a Fourth Amendment analysis. [Citation omitted.]" *Mackinney v. Nielsen*, 69 F.3d 1002, 1009 (9th Cir. 1995).

Not only is there a conflict between the Ninth Circuit and the Second Circuit, but also there is a conflict within the Ninth Circuit itself. These conflicts warrant the granting of certiorari to resolve this issue so that there will be a uniform standard of culpability, under which all claims that government officials have used unreasonable force will be analyzed under the Fourth Amendment's "reasonableness" standard.

The court below recognized but dismissed petitioners' argument:

> This argument has surface appeal: If the police kill a person, why should the claim of the surviving spouse for loss of society be governed by a different standard than the claim of the deceased's estate? The surviving spouse and the estate have both suffered a loss by the killing. It would certainly simplify jury instructions if the claims of the surviving spouse and the estate, often brought in the same action, were both governed by the objective reasonableness standard.
>
> But there is binding and persuasive authority otherwise.
>
> [Citation to *Rakas* omitted.]

137 F.3d at 1134. But *Rakas* is neither binding, nor should it have been persuasive, because it is a pre-*Graham*, standing case that post-*Graham* both sows a category mistake by mixing the category of standing with the category of culpability, and no longer can be persuasive because *Graham* made *all* claims, no matter who may bring them, of use of force during an investigatory stop or a seizure subject to the Fourth Amendment reasonableness standard. Petitioners would not, as the court below seemed to think, "be vicariously asserting Sylvan[ ] [Byrd's] Fourth Amendment rights, in violation of *Rakas's* admonition [that "Fourth Amendment rights are personal . . . (and) may not be vicariously asserted"]," *ibid.*, if their claims were analyzed under the Fourth Amendment "reasonableness" standard. Rather, petitioners would be asserting their *own* rights, but the violation of those rights would be subject to Fourth Amendment analysis: nothing

in *Rakas* addresses this point, for which the court below stretched in the absence of any citation to *Rakas* by respondents.

## 2. THE COURT BELOW ERRED BY HOLDING THAT PETITIONERS' FAILURE TO SET FORTH THE WORDS "SUCCESSORS IN INTEREST" IN THEIR COMPLAINT CONSTITUTED A FORFEITURE OF THEIR SURVIVOR-TYPE CLAIMS.

The court below held that petitioners' failure to set forth the legally-conclusory words "successors in interest" to describe themselves in their complaint constituted a basis for dismissal of petitioners' survival-type claims. The court below was wrong.

This issue should begin and end with the express language of Rule 8(a)(2), (e) and (f), F.R. Civ. P., and this Court's holding in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Rule 8(a)(2) provides, in pertinent part, that "[a] pleading . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, Rule 8(e) provides that "[e]ach averment of a pleading shall be simple, concise, and direct[ ] [and that n]o technical forms of pleading . . . are required[,]" and Rule 8(f) provides that "[a]ll pleadings shall be construed as to do substantial justice." Simply on the face of the provisions of Rule 8, a Section 1983 plaintiff who sues in a representative capacity, such as a successor in interest, need not incant the words "successor in interest" so long as that plaintiff sets forth the fact of her status, such as "spouse" or "parent," as petitioners here did.

Moreover, this Court held in *Conley* that "[i]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim *unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.*" *Conley*, 355 U.S. at 45-46 (emphasis added). Here, because it *did not appear at all, much less appear beyond doubt*, that petitioners could prove no set of facts in support of their survivor-type claims, there was no basis to dismiss them as plaintiffs as to those claims simply and only because they did not describe themselves as "successors in interest" of their deceased, Sylvan Byrd. Even respondents understood that petitioners asserted claims as successors in interest, and respondents set up defenses to those claims.

In *Smith v. City of Fontana*, 818 F.2d 1411, 1416 (9th Cir.), *cert. denied*, 484 U.S. 935 (1987), it was held that "[u]nder Section 1988, a Section 1983 claim that accrued before death survives the decedent when state law authorizes a survival action as a suitable remed[y] . . . not inconsistent with the Constitution of the United States. . . . 42 U.S.C. Section 1988 (1982)." Indeed, in *Crumpton v. Gates*, 947 F.2d 1418, 1421 (9th Cir. 1991), the court held that "as a remedy for wrongs . . . and murders done[ ] [t]his [Section 1983] is what we offer . . . to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed, as a remedy. [Citation omitted.] [There is] powerful evidence that Congress intended to provide survivors with a remedy for their own constitutional injuries occasioned by the wrongful killing of a parent. . . . " The court below simply

ignored this powerful evidence of congressional intent and this remedy, and conveniently crafted clever ways to get around it.

Under California law, as the spouse of Sylvan Byrd, Ellen Byrd is a successor in interest of decedent, as is Vivien Harkness, as the decedent's parent. Cal. Prob. Code Sections 6401, 6402, *et seq.* As the successors in interest, both petitioners had the right and the standing under California law to commence a California survival-type action pursuant to Cal. Civ. Proc. Code Section 377.30, and hence they had standing to assert decedent's civil rights claims that survived his death.

In the operative complaint, petitioners alleged *facts* sufficient to constitute a Section 1983 survival-type claim under *Smith*, and as the spouse and a parent of a deceased whose claim of injury survived his death, both petitioners had standing to sue on their deceased's behalf, both under California law and therefore under federal law.

As this Court held in *Conley*, "[i]f these allegations are proven there [is a provable cause of action]. . . . " 355 U.S. at 46. Here, if petitioners prove their allegations that (1) they were, respectively, the spouse and mother of their deceased, and (2) unreasonable force was used against their decedent during an investigatory stop and/or seizure, *see Brower, supra*, petitioners will have proved allegations that constitute a cause of action. Therefore, it was erroneous for the court below to have thrown out petitioners' survival-type claims.

### A. THERE IS A CONFLICT BETWEEN THE CIRCUITS ON THIS ISSUE.

In this case, the Ninth Circuit held that failure to have designated a plaintiff as a successor in interest to a deceased's survival-type, Section 1983 claim is fatal to that claim.

In *Baker v. Putnal*, 75 F.3d 190, 194-95 (5th Cir. 1996), the Fifth Circuit held the opposite.

The parents of Wendell C. Baker, Jr. filed a Section 1983 action based on the death of their son. On appeal, defendants claimed the court of appeals was without jurisdiction of the appeal, because the parents did not refer to the estate of their son in their notice of appeal. In rejecting this contention, the Court of Appeals for the Fifth Circuit held that "a party's failure to designate all of the capacities in which he brings suit does not defeat jurisdiction. *King v. Otasco, Inc.*, 861 F.2d 438, 443 (5th Cir. 1988)." The same is true here, and the conflict between the Ninth Circuit and the Fifth Circuit on this important, and recurring, point warrants that certiorari be granted in this case to reconcile the conflict between the two circuits.

## CONCLUSION

For the reasons set forth, this Court should grant the petition for certiorari, or should reverse summarily the court below.

YAGMAN & YAGMAN, P.C.
STEPHEN YAGMAN
*Counsel of Record*
MARION R. YAGMAN

*Attorneys for Petitioners,*
*Ellen Byrd and Vivien Harkness*

## APPENDIX A

Ellen BYRD and Vivien Harkness,
Plaintiffs-Appellants,

v.

James GUESS, Ronald Bates, Anthony Selvaggi, Alice Jemta, Charles Sylvia, Robert Wahlstrom, Robert Dunek, Los Alamitos City, Mark Vanholt,
Defendants-Appellees.

No. 96-55532.
United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 7, 1997.

Decided March 3, 1998.

Stephen Yagman and Marion R. Yagman, Yagman & Yagman, Venice, California, for appellants.

Bruce D. Praet, Ferguson, Praet & Sherman, Santa Ana, California, for appellees.

Appeal from the United States District Court for the Central District of California; Terry J. Hatter, Jr., District Judge, Presiding. D.C. No. CV-93-00523-TJH (JG).

Before: HALL, T.G. NELSON, Circuit Judges, and WINMILL, District Judge.*

WINMILL, District Judge:

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* The Honorable B. Lynn Winmill, District Judge for the District of Idaho, sitting by designation.

## INTRODUCTION

Sylvan Byrd was shot to death by two police officers. Byrd's wife, Ellen Byrd, and his mother, Vivien Harkness, brought this § 1983 action against the officers, among others. A jury trial was held, and after both sides rested, the district court declared a mistrial and invited the defendants to file a motion for summary judgment. The defendants filed the motion which the district court granted. Ellen Byrd and Vivien Harkness appealed. We affirm.

## FACTS

On January 23, 1993, Sylvan Byrd and his wife Ellen were arguing in their apartment in Los Alamitos, California. The neighbors called 911 to report a domestic disturbance, and police officers Vic Cantu and Mark VanHolt responded.

Officer Cantu arrived first. Listening through a closed door, he heard a woman sobbing and a man saying "I don't want to hurt you again." When Officer VanHolt arrived, Officer Cantu knocked on the door and covered the door's peephole with his hand. In response to the knocking, Sylvan grabbed a handgun while Ellen retreated to the kitchen where she could view the front door. Ellen testified that Sylvan opened the door with his left hand, holding the gun in his right hand behind his right thigh and pointed at the floor.

Ellen testified that Sylvan opened the door just 8 to 10 inches and bent his neck to look out. Within four seconds, according to Ellen, the officers pushed the door

open and simultaneously fired their guns through the door, striking and killing Sylvan. Ellen testified that Sylvan never raised his gun from its position behind his right thigh, and never exchanged any words with the officers. It is undisputed that Sylvan's gun was loaded and that he had not fired any rounds.

The officers recall the events differently. Officer Cantu testified that Sylvan opened the door about 18 inches, not 8 to 10 inches as Ellen testified. Officer Cantu commanded Sylvan to "let me see your hand." Officer Cantu repeated this demand three or four times but got no response. Then, as the door started to close, Officer Cantu saw Sylvan raise his gun up through the slit between the door and the door jamb, and point it at Officer VanHolt. Officer Cantu then kicked the door in and started firing through the door in the location where he felt Sylvan was standing. Officer VanHolt also started firing. Sylvan died shortly thereafter from his bullet wounds.

## LITIGATION HISTORY

Ellen Byrd and her mother Vivien Harkness (collectively referred to as the "Byrds") filed this § 1983 action to recover damages for Sylvan's death against (1) the city of Los Alamitos; (2) officers Cantu and VanHolt (the "Officers"); and (3) seven other individuals identified as "policymakers" with the city police. The complaint contained a claim under § 1983 for the violation of Sylvan's Fourth Amendment rights, and a wrongful death claim under California law.

Although the complaint notes that Ellen Byrd was Sylvan's wife, and that Vivien Harkness was Sylvan's mother, there was no allegation in the heading of the complaint or in its body that plaintiffs were suing in a representative capacity as Sylvan's successors in interest or as personal representatives of Sylvan's estate. The Officers challenged this in their Answer by stating in their twenty-seventh affirmative defense that "[p]laintiffs have no standing to bring this action as the heirs to decedent."

The parties held a pretrial conference on April 25, 1994. At this time, the only remaining defendants were the City and the Officers. The district court gave the parties thirty days to file summary judgment motions; bifurcated the *Monell* issues;[1] set a trial date for January 25, 1995; and entered a pretrial order. That order contained no indication that the Byrds were suing in a representative capacity or were pursuing their state wrongful death claim.

The discovery deadline had passed, and the Byrds complained that discovery should be reopened on the *Monell* issues. This was an oral request; no written Rule 56(f) motion was filed at this time. The district court denied the request. There was no discussion of the Byrds' failure to make any allegations in their complaint that they were suing in a representative capacity.

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[1] In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that a municipality, like the city of Los Alamitos, is subject to suit under § 1983 only if the alleged constitutional deprivation resulted from a city custom or policy.

The City moved for summary judgment under *Monell* on the ground that there was no evidence that its police department had any custom or policy of using excessive force. In response, the Byrds filed a written motion under Rule 56(f) to do more discovery.

The district court granted the City's motion for summary judgment in a short order that contained no explanation. The district court did not specifically rule on the Byrds' Rule 56(f) request. The Officers were now the only defendants.

The case went to trial on September 29, 1995, before a jury. After five days of trial, both sides rested. During a jury instruction conference with counsel, the district court raised its concern that the Byrds did not sue in their representative capacity and thus had no standing to assert Sylvan Byrd's Fourth Amendment rights. The Byrds argued that they were in fact the successors in interest under California law, even though they had not alleged that in the complaint. The Byrds also asserted that Ninth Circuit case law gave them an independent cause of action under the Fourteenth Amendment to sue in their individual capacities for their own damages including loss of society and companionship.

The district court declared a mistrial, concluding that the Byrds could not recover for the violation of Sylvan's Fourth Amendment rights because the Byrds had failed to sue in their representative capacity. The district court then invited the Officers to file a summary judgment motion. The district court recognized that although the Byrds had no Fourth Amendment claim, they might have a Fourteenth Amendment claim for loss of consortium

that they could bring in their individual capacities. The district court wanted briefing on that issue.

The district court discharged the jury without submitting any issues to them. The Officers filed a motion for summary judgment.[2] The Byrds responded with a motion to amend their complaint and modify the pretrial order. In the proposed amended complaint, the Byrds inserted a new claim that they were successors in interest to Sylvan and were asserting his Fourth Amendment rights. But the accompanying brief in support of the motion did not mention this new claim. Instead, the brief focused entirely on two other claims the Byrds proposed to add: a wrongful death claim (which was in the complaint but not the pretrial order) and a survival claim under California tort law (which had never been pled to this point).

The district court entered a Judgment granting the Officers' motion for summary judgment, and denying the Byrds' motion to amend their complaint and modify the pretrial order. The Judgment contains no explanation of the rulings. The Byrds appeal from these rulings.

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[2] The motion was made on the following grounds: (1) the Byrds did not sue in their representative capacity and hence had no Fourth Amendment claims; (2) there is no Fourteenth Amendment claim for the loss of an adult-as opposed to a minor-child; (3) even if there is a Fourteenth Amendment claim for the loss of an adult child, the Byrds failed to show that the officers were guilty of "deliberate indifference" to their rights; (4) even if the standard for the Fourteenth Amendment claim is "reasonableness," the officers acted reasonably; and (5) the officers were entitled to good faith immunity.

## ANALYSIS

1. Did the District Court err in finding that the Byrds lacked standing to assert the violation of Sylvan Byrd's Fourth Amendment Rights?

The district court did not issue a written opinion explaining its ruling that the Byrds lacked standing to assert the violation of Sylvan Byrd's Fourth Amendment rights. Nevertheless, the transcript of the court proceedings shows that the district court found that the Byrds lacked standing to assert Sylvan's Fourth Amendment rights because they did not sue in their representative capacity. Standing is a question of law reviewed *de novo*. *See Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir.1997).

It is undisputed that survival actions are permitted under § 1983 if authorized by the applicable state law. *See Smith v. City of Fontana*, 818 F.2d 1411, 1416 (9th Cir.). It is also undisputed that California law applies to this case, and permits survival actions to be brought by the personal representative of the estate of the deceased or by the deceased's successors in interest. *See* Cal.Civ. Proc.Code § 377.60 (1996).

The Byrds' complaint does assert that Ellen Byrd is "the spouse of deceased Sylvan Byrd, and Plaintiff Vivien Harkness is the mother of the deceased." But there is no indication in the complaint's heading or body that the Byrds were suing in a representative capacity as successors in interest to Sylvan Byrd or as personal representatives of his estate. The complaint says nothing about the

applicable state law on successorship interests, and nothing about whether the state law requirements have been fulfilled.

The pretrial order is likewise silent. In that section of the order where the parties are listed, the plaintiffs' names are listed without any notation of a representative capacity.

The Byrds had the burden of alleging and proving standing. *See Northwest Environmental Defense Center v. BPA*, 117 F.3d 1520, 1528 (9th Cir.1997). The Byrds failed to allege their representative capacity in their complaint, and failed to introduce any evidence that they were in fact the successors in interest of Sylvan Byrd under California law. The district court properly found that the Byrds lacked standing to assert the violation of Sylvan Byrd's Fourth Amendment rights.

2. Did the district court err in denying that portion of the Byrds' motion to amend the complaint and modify the pretrial order that sought to add an allegation that the Byrds were successors in interest to Sylvan Byrd's Fourth Amendment claim?

The Byrds attempted to cure their lack of standing by filing a motion to amend their complaint and to modify the pretrial order. The district court denied the motion without explanation. We review the district court's denial of a motion to modify a pretrial order for abuse of discretion. *See Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir.1985). The district court abuses its discretion by denying a motion to amend without explanation unless the reasons for doing so are apparent from the record. *See*

*DCD Programs, Ltd. v. Leighton,* 833 F.2d 183, 186 (9th Cir.1987). In this case, the reasons are apparent from the record, and we can find no abuse of discretion.

"Standing is a necessary element of federal-court jurisdiction." *Big Country Foods, Inc. v. Board of Education,* 952 F.2d 1173, 1176 (9th Cir.1992). If the complaint's allegations are insufficient to confer standing, "[o]ften a plaintiff will be able to amend its complaint to cure standing deficiencies." *United Union of Roofers v. Insurance Corp. of America,* 919 F.2d 1398, 1402 (9th Cir.1990). Fed.R.Civ.P. 15(a) provides that amendment shall be granted "freely when justice so requires." But this standard changes and becomes progressively more difficult to meet as litigation proceeds toward trial. Once the district court enters a scheduling order setting forth a deadline for the amendment of pleadings, modifications are allowed only upon a showing of "good cause." *See* Fed.R.Civ.P. 16(b); *Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 608 (9th Cir.1992). And once a pretrial order has been entered pursuant to Rule 16(e) setting forth the parties and issues for trial, modifications are allowed "only to prevent manifest injustice." *See* Fed.R.Civ.P. 16(e); *Johnson,* 975 F.2d at 608.

The district court should consider four factors in determining whether to modify the parties' pretrial order: (1) the degree of prejudice or surprise to the defendants if the order is modified; (2) the ability of the defendants to cure any prejudice; (3) the impact of the modification on the orderly and efficient conduct of the case; and (4) any degree of willfulness or bad faith on the part of the party seeking the modification. *See United States v. First Nat'l Bank of Circle,* 652 F.2d 882, 887 (9th

Cir.1981). It is the moving party's burden to show that a review of these factors warrants a conclusion that manifest injustice would result if the pretrial order is not modified. *See R.L. Clark Drilling Contractors, Inc. v. Schramm, Inc.*, 835 F.2d 1306, 1308 (10th Cir.1987).

The Byrds did not carry their burden before the district court. In pretrial proceedings the Byrds never presented any evidence, by affidavit or otherwise, establishing that they were successors in interest to Sylvan Byrd. The Byrds then proceeded through an entire trial without making any argument or introducing any evidence concerning their representational capacity. Not until that trial was over did they submit a proposed amended complaint that contained a single sentence alleging that they were suing as successors in interest. Their accompanying briefing said nothing about whether their Fourth Amendment claim passed the four-part test governing modifications of pretrial orders. Under these circumstances, the district court did not abuse its discretion when it denied the Byrds' motion to modify the pretrial order.

3. Did the district court err in denying that portion of the Byrds' motion to modify the pretrial order that sought to set forth more fully the pendant state tort claims?

In their motion to modify the pretrial order, the Byrds sought to add state tort claims. The Officers responded that the Byrds had never included any state tort claims in the pretrial order and had not shown the manifest injustice necessary to modify the order to add

those claims. Once again, the district court denied the motion to modify without explanation. Our standard of review is the same as in the preceding section. And once again, we find that the reasons for the district court's decision are apparent from the record, and that the district did not abuse its discretion.

Count Two of the Byrds' complaint contained a wrongful death claim under California law. The Byrds did not include any specific reference to their state tort claim in the pretrial order. But in the section of the order entitled "facts [that] remain to be litigated," the Byrds included a footnote reading as follows: "Plaintiff or Plaintiffs incorporate in this paragraph by this reference all issues raised in the operative complaint and in the Memorandum of Contentions of Fact and Law."

The Byrds' "Memorandum of Contentions of Fact and Law" is a six-page brief concerning the issues to be tried. It contains no mention whatsoever of any state tort claims. The Byrds assert, however, that their complaint asserted state tort claims and was incorporated into the pretrial order by the footnoted reference.

We disagree. The footnote's placement – in the section of the pretrial order listing "facts remain[ing] to be litigated" – indicates that at most, only the complaint's statement of facts, and not its recitation of legal claims under state tort law, was incorporated by reference. This narrow interpretation of the Byrds' attempt to incorporate the complaint by reference is buttressed by their failure to incorporate the complaint into that section of the pretrial order entitled "issues of law remain[ing] to be litigated."

The Byrds' vague attempt to incorporate claims by reference defeated the goal of Fed.R.Civ.P. 16(c) to specifically identify the issues for trial. *See First National,* 652 F.2d at 886. In *First National,* we held that the pretrial order was designed to "simplify issues and avoid unnecessary proof," and we warned that "[d]isregard of these principles would bring back the days of trial by ambush." *Id.* at 886. It would work a manifest injustice on the Officers to allow the Byrds to add tort claims that were not specifically mentioned in the pretrial order and were not addressed in any way during the trial. Under these circumstances, we find that the district court did not abuse its discretion in denying the Byrds' proposed amendment.

4. Did the district court err in dismissing the Byrds' Fourteenth Amendment claims?

The Byrds argued to the district court that even if they could not recover under § 1983 for the violation of Sylvan's Fourth Amendment rights, they could recover for the violation of their own rights under the Fourteenth Amendment. The Byrds alleged that their liberty interest in the companionship and society of Sylvan was violated. The Officers responded that the Byrds spent the entire trial arguing that the Officers did not act reasonably, and failed to assert that the Officers acted with deliberate indifference, the applicable standard for the Fourteenth Amendment.

The district court dismissed the case on summary judgment without explanation. But the transcript of argument shows the district court's reasoning. During this

oral argument, counsel raised the possibility that the Fourth Amendment claim was governed by a reasonableness standard while the Fourteenth Amendment claim was governed by a deliberate indifference standard. Counsel for the Byrds suggested giving the jury two verdict forms with a different standard on each. The district court responded that "the defendants in my estimation would have been disadvantaged in that they did not start out understanding that they would have to defend on the basis of reckless indifference." *Transcript* at 680, *ll.* 13-16. Byrds' counsel stated "I didn't either." *Id.* at *l.* 17. The district court then added the following: "That may be. Then to instruct the jury about that when neither side clearly had it in focus nor did the Court, then I think that would be imminently unfair." *Id.* at *ll.* 18-20.

It thus appears that the district court dismissed the Fourteenth Amendment claim because (1) the court believed that the claim was governed by a different standard – deliberate indifference – than the Fourth Amendment claim; (2) the Byrds had not pursued the Fourteenth Amendment claim at trial; and (3) it would be unfair to the Officers to insert a claim governed by an entirely different standard from the claim litigated at trial on the eve of closing argument.

This logic holds together so long as the two claims are truly governed by different standards. But if they are governed by the same standard, the Byrds' evidence at trial established both claims, and both should have been submitted to the jury. Thus, the threshold issue is whether the claims are governed by different standards.

Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels v. Williams,* 474 U.S. 327, 330, 106 S.Ct. 662, 664, 88 L.Ed.2d 662 (1986). The underlying constitutional rights at issue here are the Fourteenth Amendment liberty interests of a mother and wife in the society and companionship of the deceased.

The parties were unable to present any on-point authority to the district court concerning the standard governing the Byrds' Fourteenth Amendment claim for loss of society. After the district court's decision, another district court in this Circuit held that a parent's Fourteenth Amendment claim for the death of her son during an arrest by police was governed by the deliberate indifference standard. *See Smoot v. City of Placentia,* 950 F.Supp. 282, 283 (C.D.Cal.1997). *Smoot* held that the "mother's case is not covered by the 'objective reasonableness' proof standard applied in Section 1983 excessive force cases because her case is not based on that theory." *Id.* (footnote omitted). Instead, her claim was governed, the court held, by the deliberate indifference standard most recently discussed in *Lewis v. Sacramento County,* 98 F.3d 434, 441 (9th Cir.1996), *cert. granted,* ___ U.S. ___, 117 S.Ct. 2406, 138 L.Ed.2d 173 (1997). *Id.*

*Lewis* was a case brought by the parents of a boy killed during a high-speed police pursuit. The parents sued as personal representatives of their son's estate, *Id.* at 434, but did not bring any Fourth Amendment claim. *Id.* at 438 n. 3. Instead, the parents alleged "a deprivation of their son's Fourteenth Amendment due process rights in violation of . . . § 1983." *Id.* at 437. The Circuit held that "the appropriate degree of fault to be applied to high-

speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security." *Id.* at 441.

*Lewis* did confine its holding to its facts: "We do not here decide whether deliberate indifference or reckless disregard is the minimum standard for all substantive due process violations; we decide only that this standard of conduct is the minimum required to sustain a § 1983 claim in the context of a high-speed police pursuit." *Id.*

Lewis is distinguishable, the Byrds assert, because the parents there did not bring any Fourth Amendment claim. The Byrds assert that even though their loss of society claims arise under the Fourteenth Amendment, the real basis for those claims is the violation of Sylvan's Fourth Amendment rights. Thus, their Fourteenth Amendment claims should be governed by the "objective reasonableness" standard applicable to claims brought under the Fourth Amendment.

This argument has surface appeal: If the police kill a person, why should the claim of the surviving spouse for loss of society be governed by a different standard than the claim of the deceased's estate? The surviving spouse and the estate have both suffered a loss by the killing. It would certainly simplify jury instructions if the claims of the surviving spouse and the estate, often brought in the same action, were both governed by the objective reasonableness standard.

But there is binding and persuasive authority otherwise. The Supreme Court has stated that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."

*Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S.Ct. 421, 425, 58 L.Ed.2d 387 (1978) (quoting *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 966-67, 22 L.Ed.2d 176 (1969)). If the Byrds' argument is adopted, the Byrds would be entitled to damages for loss of society if Sylvan's Fourth Amendment rights were violated. In essence, the Byrds would be vicariously asserting Sylvan's Fourth Amendment rights, in violation of *Rakas's* admonition.

To avoid this dilemma, the Byrds' claim must be governed by a different standard than Sylvan's claim. This holding is consistent with our recognition in *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir.1991), that a parent's loss of a child's society "raises a different constitutional claim" than the child's direct Fourth Amendment claim. *Id.* at 325.

To prove their Fourteenth Amendment claim, the Byrds had to prove that the Officers acted with deliberate indifference to the Byrds' rights of familial relationship and society by using excessive force against Sylvan Byrd. *See Lewis*, 98 F.3d at 441; *Smoot*, 950 F.Supp. at 283. But at trial, the Byrds proceeded entirely under the Fourth Amendment's objective reasonableness test. The district court correctly reasoned that it would be unfair to submit the Fourteenth Amendment claim to the jury when there had been no evidence on it during trial. We therefore affirm the district court on this issue.

5. Did the court err in admitting a computer simulation of the shooting?

The district court granted the Officers' motion in limine to admit a computer animation of the shooting so

long as "all facial expressions are removed." The district court then reviewed the tape at trial outside the presence of the jury and admitted it, finding that it complied with his order to remove facial expressions and was not unduly prejudicial.

The Byrds now assert that the tape should not have been admitted because Sylvan is portrayed as "a nutty android . . . like somebody who is crazed." The tape should have been excluded under Rule 403, the Byrds assert, because its probative value was substantially outweighed by the danger of unfair prejudice.

Evidentiary rulings are reviewed for an abuse of discretion, and should not be reversed absent some prejudice. *See Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394, 1399 (9th Cir.1996). We cannot say that the district court abused its discretion here, and therefore reject the Byrds' challenge to the evidentiary ruling.

6. Did the district court err in refusing to reopen discovery on Monell issues?

At the pretrial conference, the district court gave the City a period of time to file a motion for summary judgment on the ground that there was no evidence of a policy or custom of excessive force by city police officers, as required by *Monell*. In response, at that same conference, the Byrds made an oral motion to reopen discovery because they expected to obtain evidence that Officer VanHolt had excessive force claims in the past that were ignored by the City. The district court denied the oral motion on the ground that the Byrds had already had enough time to conduct discovery.

After the city filed its summary judgment motion, the Byrds filed a response and made another request to reopen discovery, this time filing a written request under Rule 56(f). The district court granted the city's summary judgment motion without explanation and did not rule on the written Rule 56(f) request.

If a district court fails to address a Rule 56(f) motion before granting summary judgment, the omission is reviewed *de novo*. *See Qualls v. Blue Cross*, 22 F.3d 839, 844 (9th Cir.1994). But if the district court does address, and denies, a Rule 56(f) motion, that decision is reviewed for an abuse of discretion. *Id.*

Although the district court in this case never ruled on the written Rule 56(f) motion, it did deny the Byrds' oral motion made at the pretrial conference. That oral motion, seeking to reopen discovery on the summary judgment issue, was essentially a Rule 56(f) motion. Because it had already ruled once, the district court had no need to address the issue again when it reappeared in the written motion. Thus. [sic] we shall review the district court's decision for an abuse of discretion.

"We will only find that the district court abused its discretion if the movant diligently pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment." *Qualls*, 22 F.3d at 844 (emphasis in original). In this case, the complaint was filed on January 29, 1993. The pretrial order states that the discovery cutoff date was April 5, 1994. Even assuming that the Byrds had to wait some months after filing their complaint to begin discovery under Fed.R.Civ.P. 26(d), they

still had many months to complete discovery. The Byrds' only excuse is that they had "few resources" and "had tailored their discovery to meet the needs of the case." *See Appellants' Opening Brief at 32.* This is not a diligent pursuit of prior discovery opportunities under *Qualls*. We affirm the district court on this issue.

AFFIRMED.

## APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| ELLEN BYRD; VIVIEN HARKNESS,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>JAMES GUESS; RONALD BATES; ANTHONY SELVAGGI; ALICE JEMTA; CHARLES SYLVIA; ROBERT WAHLSTROM; ROBERT DUNEK; LOS ALAMITOS CITY; MARK VAN HOLT,<br><br>Defendants-Appellees. | No. 96-55532<br><br>D.C. No. CV-93-00523-TJH<br><br>ORDER<br><br>(Filed May 11, 1998) |

Before: HALL and T.G. NELSON, Circuit Judges, and WINMILL*, District Judge.

The panel has voted to deny appellants' petition for rehearing. Judge Nelson has voted to reject the suggestion for rehearing en banc and Judges Hall and Winmill recommend rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

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* The Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

## APPENDIX C

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| ELLEN BYRD and VIVIEN HARKNESS,<br><br>Plaintiffs,<br><br>[DEFENDANTS ARE TOO NUMEROUS TO LIST, AND THEIR NAMES ARE SET FORTH ON THE NEXT PAGE] | No. Civ.-93-523-TJH(JGx)<br><br>SECOND AMENDED COMPLAINT<br><br>(March 15, 1993 Order)<br>(Damages for Deprivation of Civil Rights)<br><br>JURY DEMAND |

### JURISDICTION AND VENUE

1. The claims made herein are asserted pursuant to the United States Constitution, and 42 U.S.C. 1983, *et seq.*, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1331 and 1343.

2. The acts complained of occurred in this District, and therefore, venue lies in this District pursuant to 28 U.S.C. 1391.

## THE PARTIES

3. The party or parties who make this Complaint were within the jurisdiction of the United States of America at all time herein alleged.

* * *

violated, caused to come into being, maintained, fostered, condoned, ratified, or failed to take action to correct and/or stop, an official policy or custom of permitting the occurrence of the types of wrongs set forth in this Complaint, and, based on the principles set forth in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), and *Heller v. Bushey*, 759 F. 2d 1371 (9th Cir. 1985), is liable for all injuries and/or damage and damages sustained by any plaintiff. All non-police officer defendants are sued on this theory both in their individual/personal capacities as well as in their official capacities.

10. Plaintiff Ellen Byrd is the spouse of deceased Sylvan Byrd, and plaintiff Vivien Harkness is the mother of the deceased.

On January 23, 1993, at 3572 Howard Avenue, Apartment #4, in Los Alamitos, Byrd and the deceased then and there resided as spouses. At that time, several unknown named defendants who were Los Alamitos police officers arrived at used unreasonable force against the deceased by shooting him to death, and used unreasonable force against plaintiff Byrd by striking and beating her. Furthermore, these defendants made an illegal entry into and search of the premises, and unreasonably

stopped, detained, and arrested plaintiff Byrd. Furthermore, these same defendants caused unreasonable damage to plaintiff Byrd's property. Plaintiffs are informed and believe that the involved officers at the scene are Mark Van Holt and Vic Cantu.

## COUNT ONE

11. At the time of the incident set forth in averment 10, the rights of persons within the jurisdiction of the United States of America under Amendment 4 to the United States Constitution to be secure in home, person, and effects against unreasonable searches and seizures, and not to be subjected to the use of excessive force were in force and effect, and any individual police defendant engaged in conduct, as set forth hereinabove, averment 10, which violated those Fourth Amendment rights, thereby violated the Fourteenth Amendment to the United States Constitution, and entitles any plaintiff to recover damages pursuant to 42 U.S.C. 1983. It also is alleged that all wrongful acts took place as part of a simple, non-racially-based conspiracy, actionable under Section 1983.

All named defendants are liable for this conduct.

## COUNT TWO

12. On January 28, 1993, plaintiffs caused a tort claim to be sent to defendant governmental entity. It has been denied.

13. All defendants are liable to plaintiffs for the wrongful death of deceased Byrd, pursuant to California state law.

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## APPENDIX D

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Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| ELLEN BYRD and VIVIEN HARKNESS,<br><br>Plaintiffs,<br><br>vs.<br><br>JAMES GUESS, et al.<br><br>Defendants. | No. CV 93-0523 TJH (JGx)<br><br><br><br>ANSWER TO SECOND AMENDED COMPLAINT |

COMES NOW, Defendants, Mark Van Holt and Vic Cantu and answering the unverified Second Amended Complaint for themselves alone and pursuant to *F.R.Civ.P.*, Rule 8, admit, deny and allege as follows:

1. For answer to paragraph one, Defendants admit the allegations in said paragraph.

2. For answer to paragraph two, Defendants admit the allegations in said paragraph.

3. For answer to paragraph three, Defendants admit the allegations in said paragraph.

* * *

TWENTY-FIFTH AFFIRMATIVE DEFENSE

39. As and for a twenty-fifth, separate and distinct affirmative defense, these answering Defendants allege that the City of Los Alamitos employees had probable cause to stop, detain and investigate the Plaintiffs' decedent and to use such force as was necessary to accomplish their lawful purpose being in all respects, reasonable, proper, necessary and legal.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

40. As and for a twenty-sixth, separate and distinct affirmative defense, these answering Defendants allege that Defendants acted in good faith and did not violate any clearly established constitutional right of Plaintiffs or Plaintiffs' decedent.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

41. As and for a twenty-seventh, separate and distinct affirmative defense these answering Defendants allege that Plaintiffs have no standing to bring this action as the heirs to decedent.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

42. As and for a twenty-eighth, separate and distinct affirmative defense, these answering Defendants allege that neither a public entity nor a public employee is liable for any injury caused by:

(1) an escaping or escaped prisoner;

(2) an escaping or escaped arrested person;

(3) a person resisting arrest.

43. As and for a twenty-ninth, separate and distinct affirmative defense, these answering Defendants allege that no conspiracy existed and that none of these Defendants committed any act or omission constituting or furthering any conspiracy to violate civil rights.

THIRTIETH AFFIRMATIVE DEFENSE

44. As and for a thirtieth, separate and distinct affirmative defense, these answering Defendants allege that neither Plaintiffs nor Plaintiffs' decedent are a member of any constitutionally protected class.

THIRTY-FIRST AFFIRMATIVE DEFENSE

45. As and for a thirty-first, separate and distinct affirmative defense, these answering Defendants allege that Defendants are entitled to all other applicable immunities provided by federal law not specifically set forth herein and specifically reserve the right to add to or amend this Answer prior to the date of the Pre-Trial Conference in order to conform the pleadings to established evidence.

THIRTY-SECOND AFFIRMATIVE DEFENSE

46. As and for a thirty-second, separate and distinct affirmative defense, these answering Defendants allege that Defendants had a lawful right to enter upon the

premises of Plaintiffs and Plaintiffs' decedent to further investigate a reasonable belief that exigent circumstances and a threat to public safety existed.

WHEREFORE, these Defendants pray for judgment against the Plaintiffs herein as follows:

* * *

## APPENDIX E

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| ELLEN BYRD, et al., Plaintiffs, against JAMES GUESS, et al., Defendants. | No. Civil-93-523-TJH<br>PRETRIAL CONFERENCE ORDER<br>Pretrial Conference:<br>Date: April 25, 1994<br>Time:10:00 A.M.<br>Place:Courtroom 17 |

[This Pretrial Conference Order mirrors the form that is set forth at Appendix A to the Local Rules of the United States District Court for the Central District of California.]

Following Pre-Trial proceedings, pursuant to Rule 16, F.R. Civ. P. and Local Rule 9, IT IS ORDERED:

Each of these parties has been served and has appeared.[1] All other parties named in the pleadings and

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[1] If any party either has not been served or has not appeared, his or her name is set forth here:

not identified in the preceding paragraph are now dismissed.

The pleadings which raise the issues are: (list)

The Second Amended Complaint and the Answer thereto.

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## APPENDIX F

**United States District Court**
**Central District of California**
**Western Division**

| | | |
|---|---|---|
| ELLEN BYRD, *et al.*, | ) | CV 93-523 TJH (JGx) |
| Plaintiffs, | ) | **Order** |
| v. | ) | **and** |
| JAMES GUESS, *et al.*, | ) | **Judgment** |
| Defendants. | ) | (Filed Mar. 26, 1996) |

The Court has considered Plaintiffs' motion to clarify certain issues, Plaintiffs' motion for leave to file a third amended complaint and to modify the pretrial conference order and Defendants' motion for summary judgment, together with the moving and opposing papers.

**It is Ordered** that Plaintiffs' motion to clarify certain issues be, and hereby is, **Denied**.

**It is further Ordered** that Plaintiffs' motion for leave to file a third amended complaint and to modify the pretrial conference order be, and hereby is, **Denied.**

**It is further Ordered** that Defendants' motion for summary judgment be, and hereby is, **Granted.**

**It is further Ordered, Adjudged and Decreed** that judgment be, and hereby is, **Entered** in favor of Defendants and against Plaintiffs.

**It is further Ordered, Adjudged and Decreed** that Plaintiffs shall take nothing and each party shall bear its own costs.

Date: March 25, 1996

/s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
United States District Judge

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